



**Shan v Nyanumba & 2 others (Environment & Land Case 402 of 2014)
[2024] KEELC 1029 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 402 OF 2014**

M SILA, J

FEBRUARY 28, 2024

BETWEEN

HABIBA ABDULLAH SHAN APPLICANT

AND

PHILIP MACHUKI NYANUMBA 1ST DEFENDANT

THOMAS MAONCHA ANETI 2ND DEFENDANT

THE LAND REGISTRAR KISII COUNTY 3RD DEFENDANT

JUDGMENT

1. The plaintiff, Habiba Abdullah Shanko, commenced this suit through a plaint which was filed on 22 October 2014. She pleaded to be the registered owner of the land parcel West Kitutu/Bomatara/5853 (parcel No. 5853) that initially formed part of the land parcel West Kitutu/Bomatara/4948 (parcel No. 4948) which was in the name of Thomas Maoncha Aniseti, the 2nd defendant, who allegedly sold the land to her. She avers that she took possession in the year 2001 and planted trees on the land which are matured. She contended that the 1st defendant working in tandem with the 2nd defendant, moved to her land and cut down her mature trees on the claim that this was his land parcel West Kitutu/Bomatara/5836. In the suit, she asked for orders for a declaration that the land parcel West Kitutu/Bomatara/5836 (parcel No. 5836) was illegally created and superimposed on her land parcel West Kitutu/Bomatara/5853 and an order of permanent injunction to restrain the 1st defendant from dealing with her land.
2. The 1st and 2nd defendants filed a joint statement of defence and counterclaim. The 2nd defendant denied selling to the plaintiff a portion of his land parcel West Kitutu/Bomatara/4948. It was also denied that the plaintiff took possession in the year 2001. They pleaded that on 10 June 2014 the 2nd defendant sold to the 1st defendant a portion of the parcel No. 4948 which was subsequently subdivided and the portion sold to the 1st defendant registered as the parcel No. 5836. They contended that the plaintiff



fraudulently obtained the title to the parcel No. 5853. In the counterclaim they asked for orders for a nullification of the plaintiff's title No. 5853 and a permanent injunction to restrain her from the parcel No. 5836.

3. The 3rd defendant, the Land Registrar, Kisii County, did not enter appearance nor participate in the suit.
4. The case was listed for hearing on 3 November 2022. The plaintiff did not attend court and her suit was dismissed for non-attendance. That therefore left the counterclaim for hearing and both defendants testified in support thereof and called one witness. Mr. G.J.M Masese, learned counsel for the plaintiff, did not avail himself to court for cross-examination and they thus testified ex parte.
5. In his evidence, the 1st defendant testified that he purchased a portion of the land parcel No. 4948 from the 2nd defendant through a sale agreement of 10 June 2014. He subsequently obtained title to the said portion as the parcel No. 5836. He stated that he took possession and fenced the land with a brick wall and has been farming in it. He testified that he has never seen the plaintiff and does not know her. He denied trespassing into her land. He stated that he does not know where her land is located. He also made reference to the documents that the plaintiff had filed to support her case. He pointed out that the sale agreement that the plaintiff filed showed that she was purchasing a portion of the land parcel West Kitutu/Bomatara/2879 (parcel No. 2879) and not a portion of the land parcel No. 4948. He further made reference to the mutation form that the plaintiff intended to rely on that was a mutation for the parcel No. 4948 which shows the land being subdivided into the parcels No. 5852 and 5853. He testified that the plaintiff could not have purchased a portion of a parcel No. 2879 and obtain her title from a mutation of the parcel No. 4948.
6. The 2nd defendant in his evidence affirmed that he sold part of his land to the 1st defendant. He stated that he does not know the plaintiff and has never sold land to anybody bearing her name.
7. I was of opinion that it would be useful to get the evidence of a surveyor since there was a claim of superimposition of title. The 1st and 2nd defendants proceeded to call Prescott Nyakang'o as their witness. He testified that he is a surveyor, holding a Diploma in Survey from Kenya Polytechnic, and that he worked as a Government Surveyor between 1985 and 2016 when he retired. He testified that he visited the land parcel No. 5853 and he found that it has a wall and gate put up by the 1st defendant. He produced a report to that effect. That report merely confirms the existence of the parcel No. 5853. He however did not have the Registry Index Map so as to demonstrate the location of the parcel No. 5853 or its existence. I gave him time to produce it but he was never called back to testify and the 1st and 2nd defendants closed their case on the above evidence.
8. Mr. Ochwangi, learned counsel for the 1st and 2nd defendants, filed written submissions to urge his clients' case. I have taken note of these submissions before arriving at my disposition.
9. It will be recalled that the plaintiff's case was dismissed and that only leaves the counterclaim for determination. In my opinion, in order to succeed in the prayer for nullification of the title of the plaintiff, the 1st and 2nd defendants need to demonstrate that the land parcel No. 5853 does not exist in the registry index map and in the records of the land registry. I regret that the evidence that they provided is insufficient in this regard. First, nobody from the Land Registry was called to testify on the existence or lack of existence of title to the land described as West Kitutu/Bomatara/5853. Secondly, no Registry Index Map of the area was produced to demonstrate that there is no title registered as West Kitutu/Bomatara/5853. The evidence of the surveyor does not help much because all he did was affirm that the land parcel West Kitutu/Bomatara/5836 exists and that it is occupied by the 1st defendant. He never brought any evidence of whether or not the land parcel West Kitutu/Bomatara/5853 exists or



not. That being the position, I cannot make any declaration that the title West Kitutu/Bomatara/5853 does not exist or that it was illegally created.

10. The other prayer of the 1st and 2nd defendants is for an order of permanent injunction to restrain the plaintiff from the land parcel West Kitutu/Bomatara/5836. In their evidence, the 1st and 2nd defendants stated that they do not know the plaintiff. There was no allegation made that the plaintiff has ever come to the land parcel West Kitutu/Bomatara/5836 to disturb the possession of the 1st defendant or to claim the ground where it is located. The pleadings of the plaintiff seem to suggest that she claims land which has fully matured trees. On the other hand, the surveyor's report produced by the 1st and 2nd defendants identifies the land of the 1st defendant as one which is walled and is planted with subsistence crops. I have no evidence that the plaintiff was claiming the same ground where the title of the 1st defendant lies. This court does not issue orders in vain where there is no dispute. One only seeks orders in court where there is an infringement of right by the person sued. In our case, I have no evidence that the plaintiff has infringed on any of the proprietary rights of the 1st defendant within the land parcel West Kitutu/Bomatara/5836.
11. Without any tangible evidence from the maps and the Land Registry records, it could very well be that the land parcel West Kitutu/Bomatara/5853, exists differently and distinctly from the land parcel West Kitutu/Bomatara/5853.
12. Given the above it is pointless issuing an order of permanent injunction against the plaintiff. The long and short of it is that I am not persuaded that the 1st and 2nd defendants have made out any case against the plaintiff and I must dismiss their suit.
13. Thus, both the plaintiff's suit and the counterclaim of the 1st and 2nd defendants, are dismissed. In essence, this court has not been persuaded to make any orders for or against the plaintiff, or the 1st and 2nd defendants.
14. The only issue left is costs. I make no orders as to costs.

Judgment accordingly.

DATED AND DELIVERED THIS 28 DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:

No appearance on the part of Mr GJM Masese for the plaintiff

Mr. Ochwangi for the defendants - Present

Court Assistant – David Ochieng

